

83-2156

CASE NO. \_\_\_\_\_

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ALEXANDER L. STEWART  
CLERK

In The  
Supreme Court of the United States

OCTOBER TERM, 1983

DONALD L. PLOTNICK,

*Petitioner,*

v.

STATE OF OHIO,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF OHIO

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PETITION FOR WRIT OF CERTIORARI

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3588



## QUESTIONS PRESENTED

- I. IS AN ACCUSED DEPRIVED OF A FAIR TRIAL, AND ENTITLED TO A NEW TRIAL, WHERE THE RECORD CLEARLY AND CONCLUSIVELY DEMONSTRATES THAT THE STATE KNOWINGLY, RECKLESSLY, OR NEGLIGENTLY ALLOWED FALSE, PERJURED TESTIMONY TO BE RECEIVED UNCONTROLLED AND SUCH FALSE TESTIMONY (OR NON-DISCLOSURE) COULD, IN ANY REASONABLE LIKELIHOOD, HAVE AFFECTED THE JURY'S ASSESSMENT OF CREDIBILITY?
- II. IS AN ACCUSED DEPRIVED OF A FULL AND FAIR CONSIDERATION OF HIS MOTION FOR NEW TRIAL WHEN THE TRIAL COURT MAKES A FINDING OF A MATERIAL FACT WHICH HAS ABSOLUTELY NO SUPPORT FROM A REASONABLE REVIEW OF THE COMPLETE RECORD?

## **PARTIES**

The petitioner in this action is Donald L. Plotnick.  
The respondent is the State of Ohio.

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OCTOBER TERM, 1983

DONALD L. PLOTNICK,

*Petitioner,*

v.

STATE OF OHIO,

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OPINIONS BELOW

The opinion of the Franklin County Court of Appeals is unreported and is attached in the Appendix (A-3). The entry of the Supreme Court of Ohio, dismissing the appeal for lack of a substantial constitutional question, is attached in the Appendix (A-13). The entry of the Supreme Court of Ohio denying Petitioner's motion for rehearing is attached in the Appendix (A-15).

## **JURISDICTION**

The judgment of the Supreme Court of Ohio was entered on April 4, 1984. A timely motion for rehearing was denied on May 2, 1984, and this petition for certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

**SECTION 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## **STATEMENT OF THE CASE**

The Petitioner, Donald L. Plotnick, was convicted of aggravated arson and extortion in the Franklin County Court of Common Pleas on April 29, 1982, on the theory that he participated in the burning of one Larry King for the purpose of collecting money owed to a co-defendant

as a drug debt. At the trial, Larry King testified that the petitioner was not involved in the assault against him. He further testified that he was not involved in drug dealing.

In an attempt to discredit King, who was called as a Court's witness, the State called Roger Smith to testify. He was presented merely as an employee of the co-defendant in question, Steve Cubberly, who had a legitimate bakery business. He was later shown to be a police informant.

Smith testified at trial that approximately one month prior to the burning incident, Cubberly had sent him to King's residence to collect \$208,000.00 from a marijuana debt. King had denied owing a marijuana debt in his trial testimony. Smith testified that King told him at this time that he had fronted the marijuana to others and could not collect the money.

At the hearing on the motion for new trial, however, Smith changed his version of this incident and claimed that he actually never did talk to King at King's residence. He further testified that the prosecutors were well aware of "what really did happen" by way of an interview with him at the prosecutor's office on January 22, 1982. The prosecutor's notes of this interview, introduced at the hearing on the motion for new trial, confirm their awareness at the time of the trial of this conflicting version of Smith's trip to King's residence. This conflicting version was never revealed to the defense.

Smith testified at the hearing on the motion for new trial that a month or so before the burning incident, Cubberly had informed Smith that he was feeling pressure from his New York drug source to pay a drug debt

he owed and that Smith should tell King that guys would be coming from New York to enforce the debt King owed Cubberly. In Smith's trial testimony, no mention was made of the New York threats. In fact, the prosecutor's notes, which showed the sequence of questions that were prepared for Smith on direct examination, reveal a careful skirting of any possible revelation of the New York threat. In discussing this issue further, at the hearing on the motion for new trial, Smith testified that Cubberly told him that the New York threat was just a ruse and that he would have "local enforcers" take care of King and the debt problem.

The Trial Court, in overruling the motion for new trial, found that the new evidence actually identified the petitioner and another as the "local enforcers", thereby causing the new evidence to be detrimental to the petitioner and, therefore, not available as grounds for a new trial. Close scrutiny of the record finds not one scintilla of evidence which could possibly give rise to this conclusion.

The testimony and police reports concerning threats emanating from New York were particularly relevant as they corroborated petitioner's trial testimony that two men from New York whom he had seen in Columbus on the night of the incident were the probable offenders. Unfortunately, the jury was deprived of any knowledge of the New York threat by the carefully planned questioning of Smith by the prosecutors at trial. Petitioner was likewise deprived of this evidence even though discovery of favorable evidence had been timely requested.

King was allegedly set on fire while he was a passenger in a limousine leased to Cubberly by one Kevin Miles who owned a limousine rental service. Although Miles usually provided drivers to Cubberly, at times Smith would drive the limousine.

Miles was a very important witness for the State as he testified that the petitioner had "bought off" King and had tried to silence his employee who was the driver of the limousine on the night in question. This employee was not, however, in the limousine at the time of the alleged burning incident.

As part of his trial testimony, Smith claimed to have never driven Kevin Miles around in the limousine. However, evidence adduced at a motion for new trial showed that Smith perjured himself in regards to this question. It seems he had driven Cubberly and Miles from Memphis, Tennessee to Columbus, Ohio over a two week period while they stopped at all the gay bars between the two locations, establishing a homosexual relationship between Cubberly and Miles. Miles had repeatedly denied homosexual activity and denied any sexual activity with Cubberly.

Comparing Smith's trial testimony to his testimony at the hearing on the motion for new trial, it is conclusively shown that Smith and Miles perjured themselves at the trial. The record further establishes conclusively that the prosecutors were aware of this perjury as it occurred and elected to remain mute on the subject.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW, DEALING WITH THE SERIOUS ISSUE OF THE KNOWING USE BY THE STATE OF FALSE TESTIMONY, CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Since the record of this case demonstrates conclusively that the prosecution knowingly, recklessly or negligently used false evidence (Smith's false testimony concerning his visit to Larry King), and that the prosecution sat idly by and permitted Smith to testify falsely on cross-examination (testimony about driving Miles around), the only question that remains is the effect of the prosecutorial misconduct.

Assuming that the Trial Court was correct in allowing Smith to impeach King concerning the marijuana deal, if Smith would have testified in accordance with what he states is the real truth as known by the prosecutors before trial, the two-edged sword would have cut deeply into the State's case. Smith would have testified, in order to impeach King, that he knew King was involved in marijuana traffic because he heard Cubberly warn King that if he didn't have the money in 30 days "a couple of guys from New York was coming in, and they were going to collect. And they weren't going to be very nice, this type of thing. It was a threat." (M.H.19). Certainly this information could reasonably affect the jury's assessment of the facts since this warning was given approximately one month before King was set on fire by a couple of unidentified men.

Likewise, when the prosecutors sat idly by and allowed Smith to testify falsely concerning Miles, the petitioner was materially prejudiced. Miles was a critical witness. He claimed the petitioner made very damaging admissions to him and that the petitioner had "bought off" the victim.

The Court of Appeals relied heavily on Miles' testimony as being a matter of weight and credibility for the jury when it affirmed petitioner's trial conviction. (That decision is part of the record in the original appeal.)

Not only would Smith's truthful testimony cast serious doubt on Miles' testimony, it also would have raised questions of motive and bias in that witness' testimony. Once again, the truth would have affected the jury's assessment of credibility.

The most recent United States Supreme Court decision to address this issue is *United States v. Agurs*, 427 U.S. 97 (1976). That decision held, *inter alia*, that it consistently ruled that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *Agurs*, at 103. Also see, *Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Alcorta v. Texas*, 355 U.S. 27 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959); *Miller v. Pate*, 386 U.S. 1 (1967); and *Giglio v. United States*, 405 U.S. 150 (1972).

The *Agurs* Court went on to state that the above line of cases set a strict standard of materiality, not just because they involve prosecutorial misconduct, but

more importantly because they involve a corruption of the truth-seeking function of the trial process. *Agurs*, at 104.

This principle announced in *Agurs* is not new. In *Giglio v. United States*, 405 U.S. 150 at 153 (1972), that Court made it clear that the deliberate deception of a Court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.

The Trial Court held that, in evaluating the evidence before it, a new trial would be ordered only if that evidence would have created a reasonable doubt of guilt that did not otherwise exist. The Trial Court clearly used the wrong standard in evaluating the evidence. The correct standard is set out in *United States v. Agurs, supra*.

In a case similar to the one at bar, the Ninth Circuit Federal Court of Appeals applied *Agurs* to the case before it and held:

The district court concluded that the nondisclosure . . . would not have affected the verdict. That is not the correct standard.

When the government permits a witness to parade himself in false colors, and the truth is discovered, the motion for a new trial should be granted if the false testimony (or nondisclosure) could, in any reasonable likelihood, have affected the judgment of jury . . . a new trial is required whenever nondisclosure *might*

*have affected the jury's assessment of credibility.*

*United States v. Butler*, 567 F.2d 885 at 891 (9th Cir. 1978). (Emphasis added.)

There can be no question that, in the case at bar, the false testimony affected the credibility of Mr. Smith, Mr. King and Mr. Miles. The Supreme Court addressed that issue twenty-five (25) years ago.

The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, *People v. Savvides*, 1 N.Y. 2d 554, 557; 136 N.E. 2d 853, 854-855; 154 N.Y. 2d 885, 887:

'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its

subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'

*Napue v. Illinois*, 360 U.S. 264, 269-270 (1959).

And if the State should suggest that Mr. Miles' credibility was drawn into question from other sources within the trial, that same *Napue* Court went on to say at 270:

*Second*, we do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one.

There can be no dispute that the prosecutors sat quietly and let Smith testify falsely during cross-examination.

As stated in 1967, and still applicable today, the United States Supreme Court held:

"More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from that established principle. There can be no retreat from that principle here." (Citations omitted.)

[*Miller v. Pate*, 386 U.S. 1 at 7 (1967).]

Such conduct by the State of Ohio and its agents is ample justification for the granting of certiorari to review the judgment below.

## II. A FINDING OF FACT BY THE TRIAL COURT FROM A NEW TRIAL MOTION HEARING WHICH HAS NO SUPPORT IN THE EVIDENCE CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Due Process requires that a finding of fact be supported in some way by the record before the trier of fact. *Thompson v. Louisville*, 362 U.S. 199 (1960). In this case, the Trial Court found that, by taking Smith's motion testimony and a police document together, the record somehow created a "message of persons answering the descriptions of defendant (Petitioner) and another as local enforcers of the co-defendant's threat to Larry King . . . no facts in the report even vaguely relates to any

fact in the case . . . , nor involves credibility of material witness".

The testimony and police report are simply devoid of any facts, assertions of facts, or suggestion of facts that the petitioner was identified as a local enforcer, and the testimony at the hearing is replete with examples of materiality and credibility.

### CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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## APPENDIX

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**STATE v. PLOTNICK, CASE NO. 83AP-439**

**Franklin County Court of Appeals, Assignments of Error  
by Defendant-Petitioner:**

**FIRST ASSIGNMENT OF ERROR:**

THE TRIAL COURT ERRED IN OVERRULING  
APPELLANTS MOTION FOR A NEW TRIAL  
BASED ON NEWLY DISCOVERED EVIDENCE.

(A.) IT WAS PLAIN ERROR FOR THE COURT  
TO OVERRULE THE MOTION WHEN  
THE RECORD BEFORE THAT COURT  
DEMONSTRATED CLEARLY AND CON-  
CLUSIVELY THAT THE STATE KNOW-  
INGLY USED FALSE EVIDENCE, AL-  
LOWED FALSE TESTIMONY TO BE  
RECEIVED UNCONTROVERTED, AND  
DELIBERATELY WITHHELD FAVOR-  
ABLE EVIDENCE FROM THE APPEL-  
LANT. SAID CONDUCT DENIED APPEL-  
LANT A FAIR TRIAL AS GUARANTEED  
BY ARTICLE I, SECTION 10 OF THE  
OHIO CONSTITUTION, AND THE FOUR-  
TEENTH, FIFTH AND SIXTH AMEND-  
MENTS TO THE UNITED STATES CON-  
STITUTION.

(B.) IT WAS ERROR FOR THE COURT TO  
APPLY THE STANDARD OF CREATING  
A REASONABLE DOUBT THAT DID NOT  
OTHERWISE EXIST TO THE MOTION  
HEARING, HENCE DENYING APPEL-  
LANT DUE PROCESS OF LAW AS GUAR-

ANTEED BY THE FOURTEENTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

- (C.) IT WAS ERROR FOR THE TRIAL COURT TO BASE ITS DECISION ON A FINDING OF FACTS THAT DID NOT EXIST ON THE RECORD, HENCE APPELLANT WAS DENIED DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
- (D.) IT WAS ERROR FOR THE COURT TO ATTEMPT TO APPLY MINIMAL DUE PROCESS REQUIREMENTS TO THE MOTION HEARING WHEN THE OHIO RULES OF CRIMINAL PROCEDURE AFFORD GREATER PROTECTION TO THE APPELLANT.

SECOND ASSIGNMENT OF ERROR:

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

**IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT**

**State of Ohio,  
Plaintiff-Appellee,**

**v.**

**Donald L. Plotnick,  
Defendant-Appellant.**

**No. 83AP-439  
(REGULAR CALENDAR)**

**OPINION  
Rendered on December 6, 1983**

**MR. MICHAEL MILLER, Prosecuting  
Attorney, and MR. ALAN C. TRAVIS,  
for appellee.**

**MESSRS. SCHWEICKART AND WILLIAMS,  
MR. GARY M. SCHWEICKART, and MR.  
LEWIS E. WILLIAMS, JR., for appellant.**

**APPEAL from the Court of Common Pleas of  
Franklin County.**

**NORRIS, J.**

**Defendant appeals from the overruling of his motion  
seeking a new trial, and raises two assignments of error:**

**"1. The trial court erred in overruling  
appellants motion for a new trial based on  
newly discovered evidence.**

"2. Appellant was denied effective assistance of counsel as guaranteed by Article I, Section 10 of the Ohio Constitution and the Fourteenth and Sixth Amendments to the United States Constitution."

The motion for new trial was based upon defendant's assertion that subsequent to trial he had discovered evidence which "would probably have changed the result of the trial" since it was "strongly corroborative of the defendant's version" of the case — that the victim, Larry King, had been burned by unknown "enforcers" from New York. The motion was filed pursuant to the provisions of Crim. R. 33(A)(6):

**"RULE 33. New Trial**

"(A) **Grounds.** A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

" \* \* \*

"(6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial. \* \* \*"

The newly discovered evidence which defendant maintained was material to his defense was a typewritten "Progress of Investigation" form prepared by a police officer and reporting his interview with an informant, relative to an investigation of defendant's co-defendant, Stephen Cubberly. The report came to the attention of

counsel subsequent to defendant's conviction, when it was brought up at Cubberly's separate trial. The report had not been furnished to defense counsel in response to his discovery request for evidence favorable to defendant.

Defendant contends that the evidence was material to the defense of his case since the report relates that the informant said that he was employed by Cubberly as his driver; that King distributed marijuana for Cubberly; that he was sent by Cubberly to King's house to collect \$208,000 owed by King to Cubberly and "to deliver a message to Larry from Cubberly which was if the money wasn't paid in thirty days, that people would come from New York to collect"; that he had seen Cubberly take delivery of marijuana which was in the trunk of a Buick bearing New York license plates and afterwards talked with a tall, 240-pound man with a New York accent; that Cubberly was gay; and that he, Cubberly, and Kevin Miles, the manager of limousine rental service, flew to Memphis, Tennessee to pick up a limousine and that "it took two weeks to return \*\*\* due to Cubberly and Miles wanting to stop at all the gay bars on the way\*\*\*."

The informant, Roger Smith, had been called by the state at defendant's trial as a rebuttal witness, for the apparent purpose of discrediting testimony by King, in which he denied a marijuana debt and asserted that defendant had not participated in the crime. Smith testified that Cubberly had employed him as his chauffeur; that he knew King and was sent by Cubberly to King's residence to collect either \$208,000 or marijuana of that value; and that King said that he had "fronted out" the marijuana to others who had not paid him for it. On cross-examination, he was asked if he "drove Kevin Miles around", and Smith answered that he did not.

Defendant asserts that knowledge of the report's existence would have assisted his defense in several respects:

First, counsel would have known that Smith had driven Miles and Cubberly back from Memphis and had seen them frequent gay bars. Miles was an important witness for the state and had denied being a homosexual and being sexually involved with Cubberly. Defendant maintains that the report would have enabled counsel to more effectively cross-examine Smith in an effort to impeach Miles' credibility. Defendant also maintains that the report establishes that Smith lied at trial when he denied that he "drove Kevin Miles around", and that the state knew he was lying and permitted the testimony to stand.

Second, defendant contends that the report tends to corroborate his version that King was burned by enforcers from New York and, had the report been available to him, Smith could have been questioned on that point.

At the hearing on defendant's motion for a new trial, Smith conceded that he was the informant referred to in the report. His testimony at the hearing appears to be at variance, in some minor respects, with his testimony at trial and with the report.

A ruling on a motion for new trial on the ground of newly discovered evidence is within the sound discretion of the trial court, and, in the absence of a clear showing of abuse of that discretion, the ruling will not be disturbed on appeal. *State v. Williams* (1975), 43 Ohio St.2d 88. The standard to be applied by the trial court in consider-

ing a motion for new trial made upon the ground of newly discovered evidence has been clearly set out by our Supreme Court:

"To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) had been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. (*State v. Lopa*, 96 Ohio St., approved and followed.)" [Syllabus, *State v. Petro* (1947), 148 Ohio St. 505.

The standard to be applied when determining the materiality of undisclosed evidence, in the context of the constitutionally guaranteed right to a fair trial, is whether the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist. *United States v. Agurs* (1976), 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342. In view of the burden placed upon the movant by the standard, and the fact that by its very nature impeachment evidence does not go directly to the question of guilt or innocence, as a practical matter, impeachment evidence would need to be unusually persuasive if the burden is to be met when the evidence is considered in the context of the entire record. See *United States v. Agurs, supra*.

The purpose of Smith's trial testimony was to impeach King's credibility. Clearly, to the extent that the evidence proffered by defendant's motion for new trial was directed toward impeaching Smith's credibility, the evidence does not meet the standard. It is not at all clear from the record that any prospective testimony by Smith concerning New York enforcers would be exculpatory since, at the hearing on the motion for new trial, Smith indicated that Cubberly acknowledged that the threat was merely a "scare tactic", and that he really intended to use local people to "get physical" with King.

The effect on the question of defendant's guilt or innocence of testimony by Smith that he drove Cubberly and Miles back from Memphis and saw them go into gay bars, is certainly obscure. Nor are we able to say that Smith's testimony that he had not driven Miles around was clearly inconsistent with his statement as contained in the report that he had driven Miles and Cubberly back from Memphis, when that particular segment of his testimony is considered within the context of his other testimony concerning his having been Cubberly's chauffeur.

Accordingly, we are unable to agree with defendant's contentions that Smith's testimony amounted to the use by the state of false evidence, or that the state deliberately withheld evidence favorable to defendant. In addition, although it may be argued that the trial court exaggerated in characterizing the evidence which lead to its conclusion that the newly discovered evidence was not clearly exculpatory, since its conclusion was supported by evidence in the record we are unable to agree that the trial court abused its discretion in that regard. In view of

the nature of the contents of the report and the discussion above, defendant has not established that he was prejudiced by the state's failure to provide him the report on discovery, even if we are to assume that the request for discovery was adequate to require its production.

In view of the foregoing, the first assignment of error is overruled.

In his second assignment of error, defendant contends that he was denied effective assistance of counsel, if we were to decide this appeal upon the basis that trial counsel failed to make a proper discovery request for the report. Since, as mentioned above, we do not determine this appeal upon that basis, the second assignment of error is overruled.

The assignments of error are overruled, and the judgment of the trial court is affirmed.

*Judgment affirmed.*

WHITESIDE, P.J., and STRAUSBAUGH, J., concur.

*STATE v. PLOTNICK, CASE NO. 84-183*

Supreme Court of Ohio, Assignments of Error by Defendant-Petitioner:

1. WHEN THE COURT OF APPEALS MAKES AN ORIGINAL FINDING OF FACT IN AN ACTION ORIGINATING IN THE TRIAL COURT THAT SUBSTANTIALLY AFFECTS APPELLANT'S ISSUES, THE SUPREME COURT WILL GRANT REVIEW AS A MATTER OF RIGHT TO THOSE ISSUES AFFECTED.
2. WHEN THE RECORD BEFORE A REVIEWING COURT CREATES A REASONABLE INFERENCE THAT THE STATE KNOWINGLY USED FALSE EVIDENCE AND THE SAME RECORD CLEARLY AND CONCLUSIVELY DEMONSTRATES THAT THE STATE KNOWINGLY, RECKLESSLY, OR NEGLENTLY ALLOWED FALSE TESTIMONY TO BE RECEIVED UNCONTROVERTED, A NEW TRIAL MUST BE ORDERED TO PRESERVE THE INTEGRITY OF THE JUDICIAL SYSTEM; AND TO PROTECT THE BASIC RIGHTS OF ALL PEOPLE TO A FAIR TRIAL AS GUARANTEED BY ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, AND THE FOURTEENTH, FIFTH AND SIXTH

AMENDMENTS TO THE UNITED STATES CONSTITUTION.

3. WHEN THE RECORD DEMONSTRATES THAT THE STATE PERMITS A WITNESS TO PARADE HIMSELF IN FALSE COLORS, AND THE TRUTH IS DISCOVERED, A MOTION FOR A NEW TRIAL SHOULD BE GRANTED IF THE FALSE TESTIMONY (OR NON-DISCLOSURE) COULD, IN ANY REASONABLE LIKELIHOOD, HAVE AFFECTED THE JURY'S ASSESSMENT OF CREDIBILITY.
4. EVEN THOUGH BROAD DISCRETION IS GRANTED TRIAL COURTS TO EVALUATE AND WEIGH EVIDENCE AT A MOTION FOR A NEW TRIAL HEARING, A FINDING OF A MATERIAL FACT MUST HAVE SOME SUPPORT FROM A REASONABLE REVIEW OF THE COMPLETE RECORD IN ORDER TO SATISFY THE DUE PROCESS REQUIREMENT OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
5. THE OHIO RULES OF CRIMINAL PROCEDURE AFFORD BROADER PROTECTION TO A DEFENDANT THAN THE MINIMAL DUE PROCESS REQUIRE-

MENTS OF THE UNITED STATES  
CONSTITUTION.

6. APPELLANT WAS DENIED EFFECTIVE  
ASSISTANCE OF COUNSEL AS GUAR-  
ANTEED BY ARTICLE I, SECTION 10  
OF THE OHIO CONSTITUTION AND  
THE FOURTEENTH AND SIXTH  
AMENDMENTS TO THE UNITED  
STATES CONSTITUTION.

**THE SUPREME COURT OF OHIO**

**THE STATE OF OHIO,  
City of Columbus.**

**State of Ohio,  
Appellee,**

**vs.**

**Donald L. Plotnick,  
Appellant**

**1984 TERM  
To wit: April 4, 1984**

**No. 84-183**

**APPEAL FROM THE COURT OF APPEALS  
for FRANKLIN County**

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_\_

Clerk

Deputy

**THE SUPREME COURT OF OHIO  
COLUMBUS**

**FRANK D. CELEBREZZE**  
**Chief Justice**

**THE STATE OF OHIO,  
City of Columbus.**

**State of Ohio,  
Appellee,**

**vs.**

**Donald L. Plotnick,  
Appellant.**

**1984 TERM  
To Wit: May 2, 1984  
Case No. 84-183**

**REHEARING**

It is ordered by the court that rehearing in this case is denied.

I, JAMES WM. KELLY, Clerk of the Supreme Court of the State of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 2nd day of May, 1984.

\_\_\_\_\_  
By \_\_\_\_\_ Clerk.  
\_\_\_\_\_  
Deputy.

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of June, 1984, three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to S. Michael Miller, Franklin County Prosecutor, 369 South High Street, Columbus, Ohio 43215, Counsel for Respondent, State of Ohio. I further certify that all parties required to be served have been served.

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**GARY M. SCHWEICKART**  
*Counsel of Record*